VISIA FINANCE BHD

v.

EXPERT CREDIT & LEASING SDN BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
ABU MANSOR ALI JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-384 OF 1995]
19 NOVEMBER 1997

CIVIL PROCEDURE: *Judgments and orders - Consent order - Variation - Whether consent order may be varied in absence of fraud - Preliminary issue determined by consent of counsel - Whether issue may be reopened - Whether order had been perfected - Whether judge was functus officio - Slip rule*

CONTRACT: *Novation - Guarantee - Validity thereof - Whether superseded by letter of novation*

The appellant entered into two master agreements with the 1st respondent ('the dealer') for credit facilities of RM4 million and RM800,000 respectively. The dealer traded in motor vehicles on hire purchase terms. Under the said master agreements, the capital acquisition was provided by the appellant in exchange for which titles to the vehicles were vested in the appellant with the dealer's undertaking to collect moneys periodically from the hirer and remit the same to the appellant. To secure the due performance of the dealer's obligations, the 2nd and 3rd respondents executed written guarantees at the same time the master agreements were executed. Some time later, differences arose between the parties and the appellant began pressing for repayment of the accrued sum due. Negotiations between the parties ended and the credit facilities under both master agreements were formally terminated by a letter dated 24 July 1987 which included new arrangements for the collection and remittance of outstanding sums on existing hire purchase agreements. In cl 4a of the said letter, the appellant also asked for additional security in the form of property to be charged in favour of the appellant. The respondent agreed to this and the letter was known as "the novation letter". Upon the respondents' failure to pay, the appellant filed a writ for the recovery of RM3,096,083.47 and the matter went to trial.

In their defence, the respondents claimed *inter alia* that the guarantees were void for uncertainty and had been superseded by the novation letter. The matter came up for hearing on 17 May 1994 before the trial judge where it was recorded by consent of both counsel, that the issue on the validity of the guarantees was to be decided as a preliminary issue to be heard on 9 August 1994. On the said date, after hearing arguments relating to the guarantees and the novation, the trial judge decided that the guarantees were not void and the only issue remaining to be disposed of was the quantum payable. The respondents did not appeal against this decision. But on the next hearing date, the respondents' new solicitors submitted that as only the issue on the validity of the guarantees had been decided, the respondents should be permitted to call evidence on novation. The appellant objected strongly claiming issue estoppel. Nevertheless, the trial judge allowed the respondents' application to reopen the matter on the basis that no order had been perfected citing the case of *Doyle v. Olby* where it was stated by Dening LJ that, "We never allow a client to suffer from the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can … ." The appellant appealed to the Court of Appeal.

Held:

Per Mahadev Shankar JCA:

[1] The court could not agree with the view the trial judge had taken. *Doyle v. Olby* was a case where the erring counsel had appealed in due time. The judge there was *functus* and the matter was being put right by the appellate court. Here both counsels had consented to proceed in a particular way. An order made by consent in the absence of fraud, can only be varied by consent. It would be a denial of justice to permit a party to resile from what his counsel decided for him merely because he lost.

[2] As to the judge's view that he could reopen the matter because no order had been perfected, it must be made clear that these curative powers may only be exercised under the slip rule if it can be clearly shown that the unextracted order was wrongly worded and in some way did not truly represent what was actually decided.

[3] The novation point was taken in the court below to neutralise the guarantees. But as demonstrated, the letter was to provide additional security. It was therefore idle to suggest that the guarantees did not continue in full force. It followed that the only issue left for the court below was to determine how much money was due from the respondents to the appellant.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah memasuki dua perjanjian utama (Master Agreements) dengan responden pertama ('peniaga') untuk kaedah kredit sebanyak RM4 juta dan RM8000,000 masing-masing. Peniaga tersebut berniaga dalam kenderaan bermotor atas terma sewabeli. Di bawah perjanjian utama, wang pokok untuk pembelian kenderaan dibekalkan oleh perayu. Ini ditukar dengan hakmilik kepada kenderaan tersebut yang diletak di bawah nama perayu dan akujanji peniaga untuk mengutip sewa dari masa ke semasa dari penyewa dan menghantar wang tersebut kepada perayu. Untuk memastikan pelaksanaan obligasi peniaga, responden kedua dan ketiga telah menandatangani dua perjanjian jaminan pada masa yang sama perjanjian utama ditandatangani. Kemudian perbalahan telah berlaku di antara kedua-dua pihak dan perayu bermula membuat tuntutan untuk bayaran balik wang yang terakru dan kena dibayar. Perbincangan di antara pihak tamat dan kaedah kredit di bawah kedua perjanjian utama ditamatkan secara formal melalui surat bertarikh 24 Julai 1987 termasuk cara baru untuk pengutipan dan penghantaran jumlah yang kena dibayar untuk perjanjian sewabeli yang masih kekal. Di dalam klausa 4a surat tersebut, perayu telah juga memohon penambahan sekuriti dalam bentuk hartanah yang dicagar untuk faedah perayu. Responden telah bersetuju kepada ini dan surat itu dikenali sebagai "surat novasi". Atas kegagalan responden untuk membuat bayaran, perayu telah memfailkan writ untuk menuntut jumlah RM3,096,083.47 dan perkara ini kemudiannya ditetapkan untuk perbicaraan.

Di dalam pembelaannya, responden telah mengatakan di antara lain, bahawa jaminan yang diberi tidak sah kerana ketidakpastian dan telah diganti oleh surat novasi tersebut. Perkara ini telah dibicarakan pada 17 Mei 1994 di hadapan hakim perbicaraan di mana telah direkodkan bahawa melalui persetujuan peguambela kedua pihak, isu kesahan jaminan dikehendaki ditentukan sebagai satu isu permulaan yang akan didengar pada 9 Ogos 1994. Pada tarikh tersebut selepas mendengar hujahan berkenaan jaminan dan novasi, yang arif hakim perbicaraan telah memutuskan bahawa jaminan yang diberi adalah sah dan hanya satu isu perlu ditentukan lagi iaitu mengenai jumlah yang patut dibayar. Responden gagal untuk merayu terhadap keputusan ini. Tetapi pada tarikh perbicaraan selanjutnya, peguambela responden yang baru telah menghujah bahawa hanya isu mengenai kesahan jaminan telah diputuskan oleh itu, responden patut diberi kebenaran untuk memanggil keterangan tentang isu novasi. Perayu telah membantah dengan tegas atas alasan perkara itu adalah isu estoppel. Walaubagaimanapun, yang arif hakim perbicaraan telah membenarkan permohonan responden untuk membuka semula isu itu atas alasan bahawa tiada sebarang perintah yang telah disahkan lagi. Yang arif hakim telah bergantung kepada kes *Doyle v. Olby* [1969] 2 QB 158 di mana

Dening LJ mengatakan "We never allow a client to suffer from the mistake of his counsel if we can possibly help it. We will always seek to rectifty it as far as we can… ." Perayu telah merayu kepada Mahkamah Rayuan.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Mahkamah ini tidak bersetuju dengan pandangan hakim perbicaraan. *Doyle v. Olby* adalah kes di mana peguambela yang salah telah merayu tepat pada waktunya. Hakim perbicaraan telah functus dan perkara ini sedang diperbetulkan oleh Mahkamah Rayuan. Di sini kedua-dua peguambela telah bersetuju untuk menjalankan kes mengikut satu cara. Satu perintah yang dibuat mengikut persetujuan jika tiada fraud hanya boleh diubahkan dengan persetujuan. Adalah bertentangan dengan keadilan untuk membenarkan satu pihak mengundur dari apa yang telah diputuskan untuk pihaknya hanya kerana dia telah kalah.

[2] Berkenaan pandangan hakim bahawa beliau boleh membuka semula perkara ini kerana tiada perintah yang disahkan, ia mesti dijelaskan bahawa kuasa pembetulan ini hanya boleh dipakai di bawah "slip rule" jika ianya boleh ditunjukkan bahawa perintah yang belum dikeluarkan mempunyai perkataan salah dan dalam apa cara pun tidak sebenarnya mewakili apa yang telah dipersetujui.

[3] Hujahan mengenai novasi telah dikemukakan di mahkamah bawah untuk menghapuskan jaminan tersebut. Tetapi sepertimana yang telah ditunjukkan, surat tersebut adalah untuk mendapat penambahan sekuriti. Oleh itu adalah salah untuk mencadang bahawa jaminan tersebut tidak berkesan. Justeru itu, hanya satu isu sahaja untuk mahkamah bawah menentukan iaitu berapa banyak adalah kena dibayar oleh responden kepada perayu.

[Rayuan dibenarkan.]

Cases referred to:
Chua Wah Keow v. Ng Ho Huat [1961] 27 MLJ 321 ***(refd)***
Doyle v. Olby [1969] 2 QB 158 ***(dist)***
Lim Kar Bee v. Abdul Latif Ismail [1978] 1 MLJ 109 ***(refd)***

For the appellant - Ajit Kumar Hastir; M/s Choo & Co
For the respondents - Fiona Bodipalar; M/s Sri Ram & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D2-220-1032-90]

Reported by Cindy Chan

JUDGMENT

Mahadev Shankar JCA:

Our decision to allow this appeal was unanimous. Our reasons now follow.

The appellant (Visia) was previously known as Sim Lim Finance (M) Berhad (Sim Lim). For all practical purposes they are the same legal entity because Visia were the successors in title to Sim Lim and inherited all its rights and liabilities.

On 10 October 1981 Sim Lim entered into a Master Agreement with the first respondent (the dealer) for a credit facility of RM4 million. We refer to this agreement hereafter as the first Master Agreement. Appeal Record p. 97. It was very comprehensive agreement. The dealer traded in motor vehicles. It did so on hire-purchase terms.

Whenever it found a customer, hire-purchase documents would be executed. These would provide that the ownership of the vehicle was vested in Sim Lim and the vehicle would be registered accordingly with the Registrar & Inspector of Motor Vehicles (R.I.M.V.). Thereupon the dealer would collect the full agreed market value of the vehicle from Sim Lim. Possession of the vehicle would move from the dealer to the hirer. Notional delivery of the vehicle would be way of the handing over by the dealer to Sim Lim of the Registration Book, which would have Sim Lim's claim endorsed thereon. The dealer's repayment of this sum and all the interest accruing over the duration of the hire-purchase agreement was to be effected by the dealer collecting the payments made by the hirer and remitting the same to Sim Lim.

As can readily be appreciated Sim Lim was taking the greatest risk. It was putting the money required for the capital acquisition up-front to the dealer. In exchange it got the pieces of paper giving title to the vehicle and another piece of paper from the dealer undertaking to collect the moneys periodically from the hirer who had possession of the vehicle.

By way of security for the due performance of the dealer's obligations of the first Master Agreement, the second and third respondents executed a written guarantee at the same time. So it is also dated 10 October 1981 (the first guarantee). Appeal Record p. 122. The consideration stated was Sim Lim's entering into the first Master Agreement.

On 1 June 1982 Sim Lim entered into a second Master Agreement with the dealer (the second master agreement). It is in the same terms as the first master agreement. (The transactions were to be maintained under a second account Appeal Record p. 110 for a credit facility of RM800,000.) Again a similar guarantee was contemporaneously executed by the second and third respondents. Appeal Record p. 124.

A high degree of fidelity was required from the dealer if Sim Lim was to get its money back. The dealer had to, first of all, ensure that the hire-purchase transactions were genuine and not phantom paper transactions. The moneys payable had to be diligently collected and remitted. Repossession in the case of defaulters had to be energetically carried out. For one reason or another, differences arose between the parties and a very large sum of money with interest thereon accrued due.

By 1987 Sim Lim's name had already changed to Visia, and the parties dealt with each other using Visia's name. In other words the respondents had accepted Visia as the assignee and successor in title of Sim Lim. Visia began to press for repayment. There were negotiations.

These negotiations terminated in a letter dated 24 July 1987. The letter was signed by the second respondent only. He confirmed that effective from 1 August 1987 the credit facility under both the first and second agreements would be terminated. The rest of the letter deals with the new arrangments for the collection and remittance of outstanding amount on existing Hire-Purchase Agreements. Obviously Visia was not satisfied that the first and second guarantees were enough for the amount then due. So they asked for **additional** security. The respondents agreed. Clause 4a of the letter reads:

> 4a) As additional securities for the agency facilities from your company, two (2) terrace houses worth $150,000.00 each and a piece of land (1 acre) in Kuala Ibai Industrial Area (all of them in Terengganu) worth $300,000.00 will be charge to your company. The amount to be charged shall be determined by your company.

The respondents' solicitors refer to this letter is the novation letter. We call it the alleged novation letter.

Visia did not get satisfaction. It filed a writ on 5 July 1990 for the recovery of RM3,096,083.47. The respondents resisted. Visia applied unsuccessfully for summary judgment under O. 14. The matter went to trial, with amended pleadings.

We are concerned here with para. 5 of the defence. It stated that both the guarantees were void. It reads:

> 5. In reply to paragraph 11 of the Amended Statement of Claim the 2nd Defendant admits that the guarantee agreement dated 10.10.81 was executed but avers that the 2nd Defendant is not liable under the said guarantee agreement. The 2nd Defendant further avers as follows:

5.1 that the guarantee is void for uncertainty and unenforceable. By the said guarantee agreement the 2nd Defendant agreed to pay to the Plaintiff by way of indemnity upon demand all sums that shall ultimately be due to the Plaintiff by the 1st Defendant in respect of goods or a motor vehicle supplied by the Plaintiff to the 1st Defendant. As the Plaintiff neither supplied goods not supplied any motor vehicles to the 1st Defendant the said guarantees are of no effect.

5.2 as the Master Agreements have been novated and substituted by the 2nd Agreement, the guarantors are no longer liable (if at all) as the original agreement has been varied.

5.3 In any event the Defendants contend and will contend that the Guarantee Agreement is unlawful, void and unenforceable being in contravention of the Banking and Financial Institution Act 1989.

Visia had filed an amended reply wherein all this was put in issue.

The trial came up before Y.A. Richard Talalla on 5 April 1994. Encik Rama Veloo who had appeared as counsel in the O. 14 application appeared again as defence counsel. He asked for an adjournment to familiarise himself with the documents. It next came up for hearing on 17 May 1995. Appeal Record p. 83. Visia's counsel opened his case. The matter was then adjourned to 3pm. The notes of Evidence (N/E) reads:

3.10 pm

Pihak seperti tadi.

Judge: By consent of both counsel the issue raised in para 5.1. of the defence namely that the guarantee is void for uncertainly be decided as a preliminary issue.

Dato' S F Wong: The Plaintiff has joined issue on para 5.1 of the defence. See para 14 of the Reply.

Adjourned to 9.8.94.

We emphasise this application was by consent of both counsel and the respondents had nearly one month to think about its implications.

The note for 9 August 1994 reads:

Judge: Counsel for both parties inform me that this morning they will be arguing solely on the issue under the guarantees between the plaintiff and the 2nd and 3rd defendants which issue is to be determined without evidence being led but simply on the submission of counsel on the pleadings and the plaintiff's bundle documents marked A.

R. Veloo: 2 master agreements which are in similar terms *mutatis mutandis* dated 10.10.81 and 1.6.82 in respect of scheduled of unscheduled goods respectively for approximately RM4 and RM800,000.00 respectively PBD 2 para 3 of preamble, PBD 12 para 22 - PBD 27 Guarantee - Clause 91) of Guarantee - **"all sums in respect of goods and motor vehcle supplied by you to him."**

"You" represent the plaintiff "him" represents the 1st defendant, the Dealer. At no time did the plaintiff supply goods or motor vehicle to the Dealer.

Letter at PBD 70 is a novation.

A Kumar: Bundle of Pleadings 9BP) - bp 44 para 5.1 - G void for uncertainty - PBD 70 does not assist.

R Veloo: I agree - refer to Clause 5.1 of BP - refer to BP 5.2 novation.

A Kumar: Produce bundle of authorities (PBA) - PBA1, PB7 PBA 24 at p. 27.

Judge: I rule that the Guarantee is not void for uncertainty. While it is true it could have been more carefully drafted, its meaning considered against all the facts and circumstances relating to this case and the transaction between the plaintiff and the 1st defendant is clear and the guarantor is liable to the plaintiff under the Guarantee. As to the amount in respect of which the Guarantor is liable there is in my view an issue to be tried, more particularly as to what transpired after the plaintiff terminated the Master Agreements by way of collection of dues from the hirers and the accounting of the commission all as raised in the counterclaim.

Adj. to 26.9.94.

Sgd.
Richard Talalla.

So the alleged inherent voidness of the two guarantees, and if not void their being superseded by the alleged novation were both argued. The order made by the judge makes it crystal clear that the only issue remaining to be disposed of was the quantum payable to Visia.

If the respondents were dissatisfied with this ruling they should have appealed before 9 September 1994. They did not.

The matter was adjourned to 26 September 1994. It was not proceeded with on that day but adjourned to 9 November 1994.

On that day respondents' counsel appeared. A joint application was made for time so that the claim could be settled. In its context the only possible inference is that the respondents had accepted liability and were now negotiating on quantum.

It came up again on 21 March 1995. Again it was adjourned to 5 April 1995. On that day Cik Fiona Bodipalar appeared for the respondents. Encik Rama Veloo also appeared but withdrew so that a change of solicitors form could be filed. The matter was adjourned to 16 May 1995.

That day the respondents did an about-turn. Cik Bodipalar submitted that only the issue of the validity of the guarantees had been decided but not the novation and that the respondents should therefore be permitted to call evidence on the novation. Visia's counsel objected vehemently claiming issue estoppel. Appeal Record pp. 91 and 92.

The Judge's ruling reads as follows:

> Judge: The view I take is that there is no question of *res judicata* or issue estoppel. No order has been perfected. I am concerned that justice must not only be done. It must be seen to be done and I for one will not allow a litigant to depart from proceedings over which I preside with a feeling that he has not been heard to completion of all his grievances. A *fortiori* in this case where the defendant has demonstrated obvious dissatisfaction with his previous legal advisers to the end that he has changed his solicitors and counsel. In the light of what counsel for the defendant has submitted I consider that it would be draconian to prevent the defendant from calling witnesses on the issue of novation. I refer to the case of *Doyle v. Olby* [1969] 2 QB 158 at p. 166 where it was stated by Dening LJ or he may have been MR. "We never allow a client to suffer from the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side". This dictum was applied in *Lim Kar Bee v. Abdul Latif bin Ismail. [This dictum was applied in the dissenting judgment of Ong Hock Sim, FJ]* [1978] 1 MLJ 109 at 115.

Against this Visia appealed. Unfortunately the trial judge did not supply any written judgment so we are left with his notes.

We regret we do not agree with the view he has taken. *Doyle v. Olby* was a case where the erring counsel had appealed in due time. The trial judge was functus and the matter was being put right by the appellate court.

Here both counsel had **consented** to proceed in a particular way. An order made by consent in the absence of fraud, can only be varied by consent. It would be a denial of justice to permit a party to resile from what his counsel decided for him merely because he lost.

As to the trial Judge's view that he could reopen the matter because no order had been perfected we must make it clear that these curative powers can only be exercised under the slip rule if it can be clearly shown that the unextracted order was wrongly worded and in some way did not truly represent what was actually decided. Reference may be made to the cases cited by appellant's counsel and in particular *Chua Wah Keow v. Ng Ho Huat* [1961] 27 MLJ 321 and *Lim Kar Bee v. Abdul Latif bin Ismail* [1978] 1 MLJ 109.

It follows from what we have said that the only issue left for the court below was to determine how much money was due from the respondents to the plaintiff.

The novation point was taken in the court below to neutralise the guarantees. But as demonstrated above the letter was to provide additional security. It was therefore idle to suggest that the guarantees did not continue in full force.